Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

RICHARD B. NELLIS, *et al.*,

Petitioners,

v.

AIR LINE PILOTS ASSOCIATION INTERNATIONAL,

Respondent.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the implied federal duty of fair representation preempts a union member's state law claims that his union breached contractual obligations owed directly to union members?

2. Whether the implied federal duty of fair representation, which is intended to protect union minorities from abuse by the union majority, permits a union to repudiate its contractual commitments to its members simply because the majority in the union so desires?

PARTIES TO THE PROCEEDING

Petitioners in this Court are Richard B. Nellis, Andrew R. Hawkins, Stuart Hughes, Edward J. Breen, Jr., Raymond T. Burke, Edward L. Fugate, Fred K. Testa, William T. Gaffney, and Vincent G. Brocklebank, who are suing on behalf of themselves and a class of 2,400 former pilots for Eastern Airlines. Respondent is the Air Line Pilots Association, International.

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Petitioners,

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AIR LINE PILOTS ASSOCIATION INTERNATIONAL,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioners respectfully pray that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 15 F.3d 50 (App. 1a-5a). The opinions of the United States District Court for the Eastern District of Virginia are reported at 805 F. Supp. 355 and 815 F. Supp. 1522 (App. 49a-61a & 6a-48a).

JURISDICTION

The court of appeals entered judgment on January 24, 1994. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

U.S. Const. Art. VI:

> This Constitution, and the laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land . . . .

STATEMENT OF THE CASE

Petitioners are nine individuals representing themselves and a certified class of 2400 similarly situated former Eastern Airlines pilots whose union, respondent Air Line Pilots Association ("ALPA"), breached its promises to arrange for them to be hired, with recognition of their years of seniority at Eastern, by air carriers that acquired Eastern's assets during and following the strike against Eastern in 1989. ALPA not only failed to take any meaningful affirmative steps to fulfill these promises, it actively obstructed their fulfillment by persuading the carriers acquiring Eastern's assets not to offer jobs with seniority to Eastern pilots.

The courts below decided that petitioners have no remedy against their union for this conduct. The district court dismissed petitioners' state law claims on preemption grounds, holding that the exclusive remedy for breach of promise by a union is the federal duty of fair representation (App. 49a-61a). The court then granted summary judgment to ALPA on the duty of fair representation claim, holding that a union's breach of promise does not violate that duty if the breach is favored by a majority of the union membership (App. 6a-48a). The court of appeals

adopted these rulings as the law of the Fourth Circuit (App. 1a-5a).

(i) Factual Background

On March 4, 1989, petitioners and the class of pilots they represent commenced a strike against Eastern Airlines (App. 6a-7a). Within days thereafter, Eastern filed a petition under Chapter 11 of the Bankruptcy Code (App. 7a).

In order to obtain support from the Eastern pilots for the strike, ALPA made two types of promises. ALPA first promised that it would apply its existing "Merger Policy" to any breakup of Eastern resulting from the strike in a manner that would ensure that Eastern pilots would transfer with seniority to carriers that acquired Eastern assets as a result of the strike (App. 13a). Independent of its Merger Policy, ALPA also promised that it would "make every effort to be sure that Eastern pilots go with [the transferred assets]," and "mandate[d] that Eastern pilots *would* be transferred with their seniority intact to any other ALPA carrier that may acquire Eastern aircraft or routes" (App. 13a). These promises were set forth in resolutions of the Executive Board, one of the highest governing bodies of ALPA, and in written and video tape communications sent into the homes of every striking Eastern pilot (App. 12a-13a).

The Merger Policy establishes an internal union procedure to ensure the transfer of pilots, with seniority, between airlines in connection with mergers and other types of asset dispositions. At the time of the Eastern strike, the Policy provided that ALPA would "take all steps" to ensure the right of pilots at a "donor" airline such as Eastern to obtain jobs,

with seniority, as pilots at an airline to which assets are transferred (App. 10a). Once the acquiring carrier committed to hire the donor carrier's pilots, the Policy provided a procedure for determining the number of pilots that would transfer and the manner in which they would be slotted into the acquiring carrier's seniority list (App. 10a).

Notwithstanding ALPA's initial promises when it was attempting to marshall support for the strike, ALPA and the Master Executive Councils ("MECs")[1] for the acquiring airlines did not support lateral transfer when ALPA carriers began to acquire Eastern's assets. Instead, in direct contacts with the acquiring carriers who would otherwise have been willing to hire Eastern pilots with seniority, they objected to lateral transfer (App. 13a-16a). Despite Pan Am management's express willingness to hire Eastern pilots with seniority in connection with Pan Am's 1989 lease of 14 aircraft from Eastern, "opposition within ALPA, specifically from the Pan Am MEC, eventually caused Pan Am to hire pilots from elsewhere" (App. 14a). There was similar opposition from within ALPA to the transfer of Eastern pilots to Midway in connection with its 1989 acquisition of 10 Eastern planes (App. 14a). Likewise, in negotiations with USAir concerning

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[1] Unlike most labor organizations, ALPA is a unitary labor organization, with a single Constitution governing all subordinate bodies. It has no local unions. Instead, ALPA has a Master Executive Council at each airline employing ALPA pilots, composed of elected representatives from that airline's pilot group (App. 7a). The MECs have no existence independent from ALPA, and under the terms of ALPA's Constitution, ALPA—not the MECs—is responsible for representing the pilots at each airline. The MECs are thus bound by ALPA's policies and ALPA is bound by the MECs'actions.

its 1989 offer to purchase 15 Eastern jets, the USAir MEC objected to the express condition in USAir's written offer that Eastern pilots be hired with seniority (App. 14a-15a). Finally, the Delta MEC reached a private agreement with management to the effect that the Policy did not apply to Delta's 1991 purchase of 10 Eastern aircraft (App. 15a).

Following the strike, ALPA interpreted and amended the Merger Policy so as to dilute or eliminate the requirement that it "take all steps" to secure lateral transfer (App. 10a-12a). ALPA then concluded that it had complied with its amended Merger Policy with respect to the Pan Am and Midway transactions in 1989 and "never formally resolved the issue of whether ALPA's . . . Policy obligations with respect to [the Delta transaction in 1991] were completely satisfied" (App. 17a-18a). ALPA never addressed whether the interference by the MECs at the acquiring carriers with their managements' willingness to hire Eastern pilots with seniority was in compliance with the Policy and promises previously made to Eastern pilots.

The allegations in the complaint, along with the fair inferences to be drawn from the record on ALPA's motion for summary judgment, were that: (1) ALPA promised to obtain lateral transfer jobs for Eastern pilots; and (2) ALPA breached that promise by actively opposing lateral transfer. As the district court concluded:

> ALPA's national leadership reached a determination in 1989 that obtaining jobs with lateral seniority at the acquiring carriers for the Eastern pilots would be politically unpopular with the majority of the ALPA membership.

> As a result, according to plaintiffs, ALPA engaged in a unified strategy to minimize and evade its obligations to the Eastern pilots under the Fragmentation Policy. . . . In the Court's view, a reasonable jury could draw inferences from the factual record to accept plaintiffs' theory (App. 35a-36a).

(ii) Proceedings Below

The complaint sought relief under state law for breach of contract, intentional interference with contractual relations, and promissory estoppel, and under federal law for breach of ALPA's duty of fair representation. The district court dismissed petitioners' state claims on the ground that they are preempted by the federal duty of fair representation. As the district court put it, the question to be decided was whether

> state common law of contract prohibited ALPA from making explicit enforceable promises to its members and then reneging on those promises, even if such conduct was not sufficiently 'arbitrary, discriminatory, or in bad faith' to satisfy the standard for breach of the duty of fair representation (App. 55a).

After acknowledging that this Court's decisions in *United Steelworkers of America v. Rawson*, 495 U.S. 362 (1990) and *I.B.E.W. v. Hechler*, 481 U.S. 851 (1987) supported the applicability of state contract law to distinct promises made by a union to its members, the district court nevertheless held petitioners' claims preempted on the theory that *Rawson* and *Hechler* do

not apply to promises that relate to collective bargaining (App. 56a-59a).

After completion of discovery, ALPA moved for summary judgment on the federal duty of fair representation claim. The district court granted the motion, holding that ALPA's breach of promise was not "arbitrary, discriminatory or [in] bad faith" within the meaning of the test set forth in *Vaca v. Sipes*, 386 U.S. 171 (1967). The court held first that it was not "arbitrary" for ALPA to accede to the wishes of the acquiring airlines' pilots even if to do so violated a promise to the minority Eastern pilots, because "[a] union leadership's decision to follow the wishes of the majority of its members is not merely rational, but is the very essence of union democracy" (App. 22a) (citing the Seventh Circuit's decision in *Rakestraw v. United Airlines, Inc.*, 981 F.2d 1524, 1533 (1992)). The district court likewise ruled that ALPA's conduct was not "in bad faith" because there was no evidence that ALPA intended renege on its promises when they were made. The court acknowledged that "plaintiffs may justifiably be upset that ALPA did not hold firm to its initial enthusiasm for seniority integration," but it concluded that "in the face of the majority of its members who had reason to oppose the policy, plaintiffs cannot argue that ALPA's initial promulgation of the policy, or ALPA's early statements in support of the policy were intended to be 'intentionally misleading' " (App. 23a-24a).

Finally, the district court found no evidence of discriminatory conduct by ALPA. Although purporting to apply a separate test for "discrimination" from that it applied to "arbitrariness," the court again deferred to ALPA's "not patently unreasonable" de-

termination that it had done all that was required by the Policy and its strike promises (App. 38a-41a). This decision, like the decision on the "arbitrary" and "bad faith" prongs of the duty of fair representation test, was based on the lower court's view of majority rule in internal union affairs. The court found evidence that the union majority had changed ALPA's commitment to the minority Eastern pilots after the latter had relied upon it:

> Until it became obvious which airline faced fragmentation of its assets, pilots at all the carriers stood an equal chance of benefitting under the Fragmentation Policy. ***Only when it became evident that it was the Eastern pilots who were likely to benefit from the implementation of the policy, to the relative disadvantage of the pilots at the acquiring airlines, did the self interest of the acquiring airlines' pilots cause them to oppose vigorous implementation of the Policy*** (App. 25a) (emphasis added).

The court nevertheless approved this conduct on the ground that "minorities within a union must expect that the union leadership will frequently make decisions adverse to their interests, if those interests are in conflict with the interests of the majority" (App. 41a-42a). The Court below thus joins the Seventh Circuit in *Rakestraw* in articulating a test of almost total deference to union majorities.

The Court of Appeals issued a *per curiam* opinion adopting the two opinions of the district court as the law in the Fourth Circuit (App. 5a).

REASONS FOR GRANTING THE WRIT

The Decision Below Preempting State Contract Claims Conflicts With Decisions Of This Court And Raises Important Questions Of Law Regarding The Proper Scope Of Labor Law Preemption.

1. The holding below that the duty of fair representation *itself* preempts state contract law (App. 55a), conflicts with this Court's established construction of the Supremacy Clause. The Court has recently reaffirmed that it is "reluctant to infer pre-emption" in the absence of an express statutory provision, and that "[c]onsideration under the Supremacy Clause starts with the basic assumption that Congress did not intend to displace state law." *Building & Construction Trades Council v. Associated Builders & Contractors*, 113 S.Ct. 1190, 1194 (1993) (quoting *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981). "The question whether a certain state action is preempted . . . is one of Congressional intent," *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 207-08 (1985); "[t]he purpose of Congress is the ultimate touchstone." *Metropolitan Life Insurance Co. v. Massachusetts*, 471 U.S. at 747, citing *Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978).

This Court has never held that the duty of fair representation is itself a source for preemption of state law. Neither the duty of fair representation nor any cause of action for its breach is contained in any law enacted by Congress. On the contrary, the duty was implied by the Court to protect union members from abuse of the exclusive collective bargaining power conferred on unions. *Vaca v. Sipes*, 386 U.S. at 181; *Steele v. Louisville & N. R. Co.*, 323 U.S. 192, 204 (1944). Obviously, Congress cannot have in-

tended a cause of action created by the courts to preempt state law; preemption in these circumstances is unprecedented and conflicts with the Supremacy Clause itself.[2]

2. Even if the duty of fair representation has some limited preemptive force, this Court's prior decisions preclude it from preempting petitioners' contract claims here. In *United Steelworkers of America, AFL-CIO v. Rawson*, 495 U.S. 362 (1990), this Court rejected a union's argument that a union member's contract claim was preempted by the duty of fair representation observing that "we have never held . . . that, as a matter of federal law, a labor union is *prohibited* from voluntarily assuming additional duties to its employees by contract." 495 U.S. at 373. Likewise, in permitting a union member to proceed with a contract claim for failure to maintain a safe

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[2] *See Rawson*, 495 U.S. at 382 (Kennedy J., dissenting) (citations omitted):

> Although we have inferred that Congress intended to impose a duty of fair representation in § 9(a), I see no justification for the further conclusion that Congress desired to grant unions an immunity from all state tort law. Nothing about a union's status as the exclusive representative of a bargaining unit creates a need to exempt it from general duties to exercise due care to avoid injuring others. At least to some extent, therefore, I would conclude that Congress "by silence indicate[d] a purpose to let state regulation be imposed."

See also, Worm v. American Cyanamid Co., 970 F.2d 1301, 1308 (4th Cir. 1992)(the lack of an explicit federal cause of action for false labeling under the Federal Insecticide, Fungicide and Rodenticide Act supported the court's finding that state law claims were not preempted by the Act); *Baker, Watts & Co. v. Miles & Stockbridge*, 876 F.2d 1101, 1108 (4th Cir. 1989)(*en banc*).

workplace in *I.B.E.W. v. Hechler*, 481 U.S. 851, 860 (1987), this Court recognized that a union can "accept[ ] a duty of care through a contractual arrangement" that it would not otherwise have under the duty of fair representation. The Court stated that breach of such a duty can be the subject of a state law "action for breach of contract or a tort . . . for the injuries suffered as a result of the contractual breach." *Id.*[3]

The courts below held that *Rawson* and *Hechler* are not controlling here, reasoning that a union cannot by contract assume "additional duties . . . [that] define bargaining positions . . . or parties with whom the union must negotiate . . . [because] duties of this nature would conflict with, rather than supplement, the duty of fair representation" (App. 58a-59a). This holding conflicts in fundamental principle with decisions of this Court that have rejected the argument that decisions respecting collective bargaining are immu-

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[3] Numerous decisions have permitted union members to pursue contract claims against their unions under section 301 of the Labor Management Relations Act ("LMRA") in circumstances governed by that statute, *Wooddell v. I.B.E.W.*, 112 S.Ct. 494, 498-501 (1991); *Hechler v. I.B.E.W.*, 834 F.2d 942, 947-49 (11th Cir. 1987); *Moore v. Local 569, I.B.E.W.*, 989 F.2d 1534 (9th Cir, 1993); *Doby v. Safeway*, 523 F. Supp. 1162 (E.D.Va. 1981); *Legutko v. Local 816, Int'l Bhd. of Teamsters*, 606 F. Supp. 352 (E.D.N.Y. 1985), *aff'd*, 853 F.2d 1046 (2d Cir. 1988), and under state law where no federal contract jurisdiction exists under section 301. *See I.A.M. v. Gonzales*, 356 U.S. 617, 618-19 (1958); *Hogan v. Bhd. of Ry., Airline and Steamship Clerks*, 629 F. Supp. 1166, 1172 n.11 (W.D. Va. 1986), *aff'd*, 817 F.2d 248 (4th Cir. 1987); *Bender v. Highway Truck Drivers & Helpers, Local 107*, 598 F. Supp. 178, 183 (E.D.Pa. 1984), *aff'd*, 770 F.2d 1066 (3d Cir. 1985); *Brown v. Sombrotto*, 523 F. Supp. 127, 133 (S.D.N.Y. 1981).

nized by the preemption doctrine from challenge under state law. The Court has refused to preempt state laws that require substantive terms in a collective bargaining agreement, stating that federal labor law "is concerned primarily with establishing an equitable *process* for determining terms and conditions of employment, and not with particular substantive terms of the bargain." *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 752-53 (1985) (emphasis added). The Court has also refused to preempt state law fraud and contract claims by replacement hires against an employer for refusal to honor strike promises that replacements would become permanent employees. *Belknap v. Hale*, 463 U.S. 491 (1983). And the Court has repeatedly rejected arguments for special treatment of collective bargaining under the duty of fair representation. *Vaca v. Sipes*, 386 U.S. at 181 (duty of fair representation suits often involve judicial review "of the substantive positions taken and the policies pursued by a union in its negotiation of a collective bargaining agreement"); *ALPA v. O'Neill*, 499 U.S. 65, 73-77 (1991) (rejecting ALPA's contention that collective bargaining is a special category of union conduct immunized from review under the duty of fair representation). The Court has thus rejected the fundamental basis for the lower court preemption of petitioners' breach of promise claims.

3. Finally, any preemptive force attributed to the duty of fair representation must derive solely from the overlap of the duty with some substantive federal labor statute. *See Vaca v. Sipes*, (breach of duty of fair representation may constitute an unfair labor practice); *Amalgamated Association of Street, Electric Ry. & Motor Coach Employees v. Lockridge*, 403 U.S.

274, 289 (1971).[4] Neither the lower court nor ALPA has ever identified any provision of the federal labor statutes that prohibits, protects or leaves unregulated the voluntary obligation assumed by ALPA which petitioners seek to enforce under state law in this case. *San Diego Building Trade Council v. Garmon*, 359 U.S. 236, 244 (1989); *Building & Construction Trades Council v. Associated Builders & Contractors*, 113 S.Ct. 1190, 1194-95 (1993); *Machinists v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132, 140 (1976); *Metropolitan Life Insurance Co. v. Massachusetts*, 471 U.S. 724, 750 (1985).

ALPA's promise to ensure lateral transfer for Eastern pilots is one of a number of acceptable courses of action for the union to pursue when assets are transferred between airlines, and the union does not contend otherwise. Petitioners' claim is simply that, having settled on this completely valid course in advance and asked the Eastern pilots to strike in reliance upon the promise that it would pursue this action, the union may be held liable in damages when

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[4] Petitioners' claims are plainly not preempted because they infringe on the primary jurisdiction of any administrative agency charged by Congress with administering the RLA, as the lower court acknowledged (App. 53a n. 2), *Andrews v. Louisville & Nashville R.R. Co.*, 406 U.S. 320 (1972); *see also Lockridge*, 403 U.S. at 289 (claim would involve the primary jurisdiction of the National Labor Relations Board), or because they seek to enforce or otherwise depend on the interpretation of a collective bargaining agreement. *Andrews*, *supra* (such suits preempted by section 204 of the RLA); *see also*, *Allis Chalmers v. Lueck*, 471 U.S. 202 (1985)(suits requiring interpretation of collective bargaining agreement preempted by section 301 of the LMRA); *Hechler*, *supra* (same); *Rawson*, *supra* (same).

it reneges afterwards and actively opposes the outcome it previously promised to support. In such circumstances, there is no basis recognized by this Court for intruding on "the interest of the State in providing a remedy to its citizens for breach of contract." *Belknap, Inc. v. Hale*, 463 U.S. at 512.

The Decision Below That The Duty Of Fair Representation Permits A Union To Breach Commitments To The Union Minority On The Ground That Breach Is Favored By The Majority Conflicts With The Precedents Of This Court And The Courts Of Appeals

1. Beginning with *Steele v. Louisville & N.N.R. Co.*, 323 U.S. 192, 204 (1944), in which the Court first acknowledged a union's duty of fair representation "to represent the entire membership of the craft . . . without hostile discrimination, fairly, impartially, and in good faith," cases have universally recognized that the purpose of the duty is to protect individuals and union minorities from abusive exercise by the union majority of the union's exclusive representational power. 323 U.S. at 200; *Breininger v. Sheet Metal Workers Int'l*, 493 U.S. 67, 79 (1989) (duty is an essential means of enforcing the principle that 'no individual union member may suffer invidious, hostile treatment at the hands of the *majority* of his coworkers.' " (quoting *Lockridge*, 403 U.S. at 301 (emphasis added))); *see also Rakestraw v. United Airlines, Inc.*, 989 F.2d 944, 947 (7th Cir. 1993) (Ripple, J., dissenting from denial of rehearing *en banc*); *Air Wisconsin Pilots Committee v. Sanderson*, 909 F.2d 213, 217 (7th Cir. 1990), *cert. denied*, 498 U.S. 1085 (1991); *Haerum v. ALPA*, 892 F.2d 216, 221 (2d Cir. 1989); *Beardsley v. Chicago & North Western Transportation Co.*, 850 F.2d 1255, 1266-67 (8th Cir. 1988), *cert. de-*

nied, 489 U.S. 1066 (1989). A union violates the duty of fair representation to the union minority when its conduct is "arbitrary, discriminatory or in bad faith." *Vaca v. Sipes*, 386 U.S. at 190.

When the court below followed the Seventh Circuit's recent decision in *Rakestraw v. United Airlines, Inc.*, 981 F.2d 1524 (1992) and held that ALPA's conduct here comports with the duty of fair representation because it represents the wishes of the majority of the union, it put itself directly at odds with the decisions of this Court and other courts of appeals. In *Rakestraw*, the Seventh Circuit rejected claims by union minorities on the ground that "the majority is entitled to prevail." 981 F.2d at 1531; *see also Rakestraw v. United Airlines, Inc.*, 989 F.2d at 947 (Ripple, J., dissenting from denial of rehearing *en banc*). The Fourth Circuit allied itself with this view of the duty of fair representation when it adopted the district court's opinion that the union majority could change ALPA's commitment to the Eastern minority after the minority had relied upon it. As the lower court found, "[o]nly when it became evident that it was the Eastern pilots who were likely to benefit from the implementation of the policy, . . . did the self interest of the acquiring airlines' pilots cause them to oppose vigorous implementation of the Policy" (App. 25a). The decision below approves this conduct on the ground that "minorities within a union must expect that the union leadership will frequently make decisions adverse to their interests, if those interests are in conflict with the interests of the majority" (App. 42a).

In joining the Seventh Circuit's almost total deference to union majorities in *Rakestraw*, the Fourth

Circuit is in fundamental conflict with the very purpose for which the duty of fair representation was created by this Court. Obviously, if majority preference is, in and of itself, a sufficient justification for union sacrifice of minority contract rights, then the duty cannot, by definition, serve to protect union minorities from majority action.

2. The decision below, following *Rakestraw*, also puts the Fourth Circuit in conflict with decisions of the First, Second, Seventh and Ninth Circuits defining the test for "discrimination" violative of the duty of fair representation.[5] Each of those circuits holds that a union engages in discriminatory conduct when it makes decisions and sacrifices minority interests solely to benefit the majority. *Teamsters Local Union No. 42 v. NLRB*, 825 F.2d 608, 611 (1st Cir. 1987); *Barton Brands, Ltd. v. NLRB*, 529 F.2d 793, 798-99 (7th Cir. 1976); *Jones v. Trans World Airlines, Inc.*, 495 F.2d 790, 797-98 (2d Cir. 1974); *Bernard v. ALPA*, 873F.2d 213, 217 (9th Cir. 1989).

For example, the First Circuit in *Teamsters Local 42* found that the union's endtailing for seniority purposes of the minority group of two employee groups merging to form a new local was discriminatory:

> [A] union may not neglect the interests of a membership minority solely to advantage the

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[5] *Rakestraw* dismissed the tri-partite standard discussed in *ALPA v. O'Neill*, *supra* as "conclusions—epithets rather than standards of conduct or tools of analysis," 981 F.2d at 1530, and suggested that the three prongs were subject to the same highly deferential standard: "Buzzwords such as 'bad faith' and 'arbitrary' being empty, *O'Neill* analogized the union's choice to that of a legislature, subject to the most deferential judicial review." 981 F.2d at 1532.

> membership majority. Union members are to be accorded equal rights, not subjugated arbitrarily to the desires of a 'stronger, more politically favored group. . . .'

825 F.2d at 611 (citations omitted). The union's insistence on endtailing, in the First Circuit's view, "constituted both discrimination in assigning seniority . . . and a breach of the union's duty fairly to represent all of its members." 825 F.2d at 613.

The Seventh Circuit has likewise disapproved of endtailing a group of employees "*solely* for the benefit of a stronger, more politically favored group." *Barton Brands, Ltd.*, 529 F.2d at 798-99. That Court distinguished other cases that had approved seniority determinations because in those cases the "affected employees . . . were [not] prejudiced by relinquishing other employment opportunities in reliance on the dovetailing arrangement" later withdrawn by the union. *Id.* at 800.[6] To the same effect is the Ninth Circuit decision in *Bernard*, where the Court approved a judgment that ALPA breached its duty of fair representation in violating the terms of its Merger Policy and negotiating the integration of the seniority lists of two merging carriers in a manner that discriminated against the less politically powerful group, which had been non-union prior to the merger. *See also Jones*, 495 F.2d at 797-98 (discriminatory to make seniority determination on basis of length of union membership).

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[6] The panel opinion in *Rakestraw* cited *Barton Brands* with approval, 981 F.2d at 1535, while the dissent from denial of rehearing *en banc* suggested that the panel decision was inconsistent with *Barton Brands*. 989 F.2d at 947.

The decision of the court below conflicts with the decisions of these circuits. The lower court explicitly concluded that there was evidence, sufficient to go to a jury, that "ALPA engaged in a unified strategy to evade and minimize its obligation to the Eastern pilots" because lateral transfer "was politically unpopular with the majority of the ALPA membership" (App. 35a). As in *Barton Brands*, 529 F.2d at 800, moreover, ALPA here did not write on a clean slate—its prior commitment to the Eastern pilots to secure lateral seniority, upon which they relied in determining to risk their jobs by striking, limited the action the union might otherwise have been able to take without violating its duty to the Eastern minority. When the court below approved ALPA's elimination of the Eastern pilots' rights to lateral transfer because "minorities within a union must expect that the union leadership will frequently make decisions adverse to their interests, if those interests are in conflict with the interests of the majority" (App. 42a), it squarely rejected the discrimination rulings of the First, Second, Seventh and Ninth Circuits.[7]

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[7] The decision below also conflicts with the arbitrariness test articulated by this Court. This Court has never suggested that majority preference alone satisfies the test for rationality under the arbitrariness test, as the court below holds (App. 22a)("[a] union's decision to follow the wishes of the majority of its members is not merely rational, but is the very essence of union democracy."). This Court has, moreover, rejected analysis of union conduct in isolation from the "factual and legal landscape at the time of the union's actions." *ALPA v. O'Neill*, 499 U.S. at 67. The lower court's failure to consider the factual context—the union promises and the union interference with the acquiring carriers' willingness to hire Eastern pilots laterally—in determining that ALPA's conduct was rational misapplies the *O'Neill*

The Decision Below Raises Important Questions of Federal Labor Law And Policy Regarding The Extent Of The Protections Afforded Union Minorities Against Union Abuse Of The Exclusive Bargaining Authority

The decision below raises important questions of federal labor law and policy regarding the protections afforded union minorities against abuse of power by the union majority. The preemption of state contract claims in favor of a toothless duty of fair representation leaves union members in the Fourth Circuit with no meaningful remedy for a union's breach of contract and grants unions a license to make and break commitments to their members with impunity. By preempting state law remedies and making the principle of majority rule the touchstone under federal law, the court below distorted the purpose of the duty of fair representation and turned it from a shield for union minorities into a sword that unions may use to

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arbitrariness test. *See, e.g., Lewis v. Tuscan Dairy Farms, Inc.*, 829 F. Supp. 665, 667-69 (S.D.N.Y. 1993).

The lower court application of the bad faith test conflicts with decisions of the District of Columbia and Eighth Circuits. The First, Fifth and Seventh Circuits, now joined by the Fourth Circuit, take the view that strike promises later disavowed are in bad faith only if the union intended not to honor them when they were made. *Swatts v. United Steelworkers of America*, 808 F.2d 1221, 1224-25 (7th Cir. 1986); *O'Neill v. ALPA*, 939 F.2d 1199, 1201 (5th Cir. 1991); *Bautista v. Pan American World Airlines, Inc.*, 828 F.2d 546, 550 (9th Cir. 1987). The District of Columbia and Eighth Circuits hold that such promises are actionable without regard to the union's intent at the time the promises were made. *Warehouse Union 860 v. NLRB*, 652 F.2d 1022 (D.C. Cir. 1981); *Anderson v. United Paper Workers Int'l Union, AFL-CIO*, 641 F.2d 574 (8th Cir. 1981); *cf. Belknap v. Hale*, 463 U.S. 508 (1983) (permitting suit against employer for strike promises and misrepresentations).

oppress those who hold unpopular views. This almost complete emasculation of the remedies available to injured minority union members raises important issues of federal labor law and policy of wide applicability which should be addressed and clarified by this Court.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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